Supreme Court, U.S.
FILED
MAY 22 2000
OFFICE OF THE CLERK

(1)

No. 991862

In The Supreme Court of the United States

REXFORD KIPPS, CAROL KIPPS, and KYLE KIPPS,

Petitioners,

v.

JAMES CAILLIER, RAY AUTHEMENT, NELSON J. SCHEXNAYDER, JR., and NELSON STOKELY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

J. Minos Simon
J. MINOS SIMON, LTD.
1408 West Pinhook Road
Post Office Box 52116
Lafayette, LA 70505-2116
(337) 233-4625

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

6004P

QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS MISAPPLY THE DOCTRINE OF QUALIFIED IMMUNITY IN CONTRAVENTION OF THE LAW AS ANNOUNCED BY THIS COURT AND AS APPLIED BY THE OTHER CIRCUITS?

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Sup. Ct. R. 14(b), the Petitioners submit the following list of parties to the proceedings before the United States Court of Appeals for the Fifth Circuit.

The Petitioners are Rexford Kipps, Carol Kipps, and Kyle Kipps, who were Plaintiffs-Appellants in the Court of Appeals.

The Respondents are James Caillier, Ray Authement, Nelson J. Schexnayder Jr., and Nelson Stokely, who were the Defendants-Appellees below.

There are no parent companies or nonwholly owned subsidiaries involved in this case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE

Proceedings Below 2

STATEMENT OF THE FACTS

The Early Factual Seedbed 4

ARGUMENT

THE COURT OF APPEALS MISAPPLIED THE DOCTRINE OF QUALIFIED IMMUNITY IN CONTRAVENTION OF THE LAW AS ANNOUNCED BY THIS COURT AND AS APPLIED BY THE OTHER CIRCUITS 6

TABLE OF CONTENTS (CONT'D)

	Page
CONCLUSION	21
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases **Page**

Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983) ..... *passim*

Eugene v. Alief Independent School District, 65 F.3d 1299 (5th Cir. 1995), *cert. denied*, 517 U.S. 1191 (1996) 14

Fyfe v. Curlee, 902 F.2d 401 (5th Cir.), *cert. denied*, 498 U.S. 940 (1990) ..... *passim*

Gould v. Davis, 165 F.3d 265 (4th Cir. 1998) 17

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6, 7

Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988) 16

Kipps v. Caillier, 197 F.3d 765 (5th Cir. 1999) ..... *passim*

Kipps v. Caillier, 205 F.3d 203 (5th Cir. 2000) 1, 10, 13

Morris v. Dearborne, 181 F.3d 657 (5th Cir. 1999) 13, 14, 16

Pickering v. Board of Education, 391 U.S. 563 (1968) 8

Stanley v. Illinois, 405 U.S. 645 (1972) 16

Wilson v. Layne, 529 U.S. 603, 119 S. Ct. 1692 (1999) ..... *passim*

TABLE OF AUTHORITIES (CONT'D)

Statutes **Page**

28 U.S.C. § 1254 1

42 U.S.C. § 1983 ..... *passim*

Fed. R. Civ. P. 12 3

Sup. Ct. R. 14 ii

U.S. Const. amend. I 1

U.S. Const. amend. IV 11, 12, 14, 15

U.S. Const. amend. XIV 14

OPINIONS BELOW

The opinion and order of the United States District Court for the Western District of Louisiana, dated August 19, 1998, granting the motion of the Respondents for summary judgment is set forth in the Appendix beginning at A-1.

The opinion and order of the United States Court of Appeals for the Fifth Circuit affirming in part and vacating in part the order of the district court, dated December 9, 1999, is reported at *Kipps v. Caillier*, 197 F.3d 765 (5th Cir. 1999), and is set out in the Appendix beginning at A-8. The opinion of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing *En Banc*, dated February 25, 2000, is reported at *Kipps v. Caillier*, 205 F.3d 203 (5th Cir. 2000), and is set out in the Appendix beginning at A-24.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit affirming in part and vacating in part the order of the district court was entered on December 9, 1999. The final judgment of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on February 25, 2000.

This Court has jurisdiction to review the orders and judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of the section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Proceedings Below

On July 22, 1997, Petitioners instituted an action in the United States District Court for the Western District of Louisiana against Respondents, asserting that while acting under color of state law these Respondents violated Petitioners' constitutional rights of privacy and association in violation of 42 U.S.C. § 1983. On August 28, 1997, Respondents Authement, Schexnayder, and Stokely filed a Motion to

Dismiss for failure to state a claim upon which relief can be granted pursuant to Fed R. Civ. P. 12(b)(6). Respondent Caillier, on September 12, 1997, joined in that motion. On October 31, 1997, the district court denied Respondents' Motion to Dismiss, the presiding judge then concluding that "the court finds that the plaintiffs' complaint contains allegations of fact which, when viewed in the light most favorable to the plaintiffs, are sufficient to preclude the dismissal of plaintiffs' claims under 42 U.S.C. § 1983."[1]

In November 1997, Respondents interposed the affirmative defense of qualified immunity. On August 18, 1998, the district court granted Respondents' Motion for Summary Judgment based on qualified immunity, concluding that it found that "the facts established purport to show that the defendants' motivation was reasonable. Plaintiffs, moreover, have failed to show that defendants knew or should have reasonably known that their actions would violate the constitutional rights of the plaintiffs." The district court cited to no summary judgment evidence tending to support its conclusion that the "defendants' motivation was reasonable."

Petitioners appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the district court. The Court of Appeals concluded that Respondents had intruded upon a well-established constitutional liberty interest of Petitioner Rexford Kipps in familial association, derived from the First Amendment to the United States Constitution, but that the Respondents nonetheless were entitled to qualified immunity because their actions, although unconstitutional, nonetheless were objectively reasonable. *Kipps v. Caillier*, 197 F.3d 765

---

[1]Presiding Judge Haik recused himself from this case on May 19, 1998. Thereafter, on May 28, 1998, United States District Judge Little took over management of this case.

(5th Cir. 1999). Petitioners filed a timely Motion for Rehearing and Suggestion for Rehearing *En Banc*, which was denied by the court on February 25, 2000. The Court of Appeals reaffirmed its conclusion that, although Respondents had intruded on a constitutional liberty interest of Petitioner Rexford Kipps, Respondents nonetheless were entitled to claim qualified immunity. This Application for Writ of Certiorari followed.

STATEMENT OF THE FACTS

The Early Factual Seedbed

This case presents fundamental questions regarding the liberty rights of individuals in the area of the right of privacy and familial association. Petitioners Rexford Kipps and Carol Kipps are husband and wife, and Kyle Kipps, born on October 10, 1978, is their major son. At all times material, Rexford Kipps was an assistant football coach at the University of Southwestern Louisiana (USL), a public institution. Kyle was a highly talented football player, and, on graduating from high school, was recruited by practically every major university in America to play football.

Kyle's parents became deeply involved with their son in the private, confidential, and intimate decisionmaking process as to Kyle's future career as a college football player. Respondent Stokely, Head Football Coach, University of Southwestern Louisiana and Rexford Kipps's immediate superior, aggressively interfered and intruded himself into Petitioners' private zone of familial interaction and discussions regarding Kyle's future career as a football player. Respondent Stokely strongly intimated to Rexford Kipps that under no circumstances should Kyle enroll as a football player and student at any university in Louisiana other than USL. Further, he threatened Rexford Kipps with termination of his employment as an assistant football coach at USL if Kyle were

to enroll at any other Louisiana university. Thus, Respondent Stokely held hostage Kipps's coaching employment with USL as a means of coercing Kipps into compelling his son to play football at USL, thereby interfering with Petitioners' free exercise of their right of privacy and familial association.

Kyle's parents did not inform Kyle of Stokely's threats because they did not want to remove from the table of discussion Kyle's options to attend any university, in or out of the State of Louisiana, as a football player. As the recruiting deadline became imminent, the intensity of Stokely's interference with the family's discussions of Kyle's education and his future life increased. Finally, in early February 1997, with the concurrence of his parents, and consistent with their familial discussions, Kyle reached the decision that he would enroll at Louisiana State University (LSU).

On February 2, 1997, in a telephone conversation, Kyle informed Coach Stokely that he, Kyle, had decided to enroll at LSU and would soon sign a formal agreement to do so. Stokely's response was to the effect that "that was a bad decision." Stokely then called Rexford Kipps into conference and substantially informed him that he should not let his son sign the proposed agreement to play at LSU. Rexford Kipps responded that he could not command his son to do or not do what his son considered to be in his own best interest. On or about February 3, 1997, Kyle signed an agreement to play at LSU. On February 12, 1997, Respondent Stokely called Rexford Kipps into conference and told him that he was fired solely because of Kyle's decision to enroll at LSU. The termination of Rexford Kipps's employment was confirmed by the other Respondents in the chain of command—through Respondent Nelson J. Schexnayder Jr., Director of Athletics, University of Southwestern Louisiana; Respondent Ray Authement, President, University of Southwestern Louisiana; and Respondent James Caillier, President of the State Colleges and Universities System of Louisiana. Thus, Kyle's career as

a football player was launched on the ruins of his father's career as a football coach.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED THE DOCTRINE OF QUALIFIED IMMUNITY IN CONTRAVENTION OF THE LAW AS ANNOUNCED BY THIS COURT AND AS APPLIED BY THE OTHER CIRCUITS.

Public officials acting within the scope of their official duties generally are shielded from civil liability by the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). Qualified immunity, however, does not shield a public official whose conduct violates clearly established constitutional rights if a reasonable person would have known that such conduct was unconstitutional. *Id.* at 818. From these fundamental principles, the Fifth Circuit saw fit to conclude that a football coach would have no recourse under 42 U.S.C. § 1983 where his employment at a state-supported institution of higher learning was terminated solely because his son, a talented high school athlete, chose to attend and play football at another institution of higher learning in the same state. That the Fifth Circuit could reach that result solely on the ground of qualified immunity bespeaks just how thoroughly the Fifth Circuit misunderstands the direction and guidance of this Court in applying the law of qualified immunity in the civil rights context.

Ascertaining the reasons for the judgment of the Court of Appeals requires a careful reading of its two opinions that are perplexing in their fundamental misreading of the applicable law. While the court in both opinions declared that it was basing its decision solely on the doctrine of qualified immunity, the reasoning of the court in reaching that decision is a muddle. In the initial reported opinion of the court, *Kipps*

v. Caillier, 197 F.3d 765 (5th Cir. 1999), the court assumed "that defendants violated Kipps's clearly established constitutional liberty interest in familial association." *Id.* at 768. (A-15.) Thus, liability should follow, one would suppose, but for the affirmative defense of qualified immunity, long recognized and approved by this Court when appropriately applied in civil rights cases. *Harlow v. Fitzgerald*, 457 U.S. at 815-19.

The Court of Appeals devised and applied a "three-part test" for determining whether qualified immunity should shield the Respondents from liability, indulging in the creative fiction that this putative test had been authorized and approved by this Court. The heart of the Fifth Circuit's reasoning warrants quotation as follows:

> In order to establish that the defendants are not entitled to qualified immunity, plaintiffs must satisfy a three-part test. See, e.g., Morris, 181 F.3d at 665. First, "[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of a constitutional right at all." Wilson v. Layne, 526 U.S. 603 ___, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999); see also Morris, 181 F.3d at 665. Second, the court must "determine whether that right was clearly established at the time of the alleged violation." Wilson, 526 U.S. at ___, 119 S.Ct. at 1697. Finally, the court "must determine whether the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the defendant actually engaged in the conduct that violated the clearly-established right." Morris, 181 F.3d at 666 (quoting Kerr v. Lyford, 171 F.3d 330, 339 (5th Cir.1999)). [FN2] If it is determined that the

> official's conduct was unconstitutional, then the court must decide whether the conduct was nonetheless "objectively reasonable." See Eugene v. Alief Indep. School Dist., 65 F.3d 1299, 1305 (5th Cir.1995).

Kipps v. Caillier, 197 F.3d at 768 (footnote omitted). (A-15.)

That the Respondents interfered with a clearly established constitutional interest in familial association is made clear not only from the opinion of the Court of Appeals in this case but also from the court's own reported jurisprudence. In *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir.), *cert. denied*, 498 U.S. 940 (1990), the court held that a school district and its officials had committed a violation of 42 U.S.C. § 1983 when the employment of a nontenured, at-will, public school secretary was terminated for enrolling her daughter in a private, all-white academy. The court reasoned that "[w]e have no doubt that conduct such as Mrs. Fyfe's in transferring her daughter to private school enjoys constitutional protection." *Id.* at 403.

The court had reached a similar conclusion in *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), where the court held under similar circumstances that a claim for a violation of 42 U.S.C. § 1983 had been made out where a public school employee was fired for sending her son to attend a private academy, rather than public school. The court recognized that "[t]he state may legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct *materially and substantially impedes the operation of effectiveness of the educational program*." *Id.* at 1359 (emphasis added). In so reasoning, the court relied on *Pickering v. Board of Education*, 391 U.S. 563 (1968), directing the district court on remand as follows:

> On remand . . . the district court must determine whether the enrollment of Chris Brantley in the private school materially and substantially interfered with the operation or effectiveness of the educational program at Kilmichael Elementary. If the court finds that it did not, then as a matter of law, Mrs. Brantley's interest in controlling the education of her son takes precedence over the school board's interest in regulating the activities of its cafeteria workers.

Brantley v. Surles, 718 F.2d at 1359 (footnotes omitted).

Brantley and *Fyfe* were consistently decided because the state actor had intruded on the same right in a similar way. The public officials in both cases were called upon to justify their actions under the same standard. How the school officials could justify the termination of the public employees in those two cases on the ground that the decision to enroll children in private academies "materially and substantially interfered with the operation or effectiveness of the educational program[s]" was a subject on which the court was unwilling to speculate. The skepticism of the court on that subject is clearly evident from both opinions and hardly surprising. That the school administrators in both cases subjectively believed that some legitimate purpose was to be served by deterring school employees from sending their children to private schools may be presumed. There was nothing in either case to suggest that any malice or animus was directed at either employee personally. Instead, the school administrators undoubtedly sought to achieve some goal that they considered legitimate. That they may have acted in good faith did not satisfy the Fifth Circuit, and for good reason. The state may intrude on clearly recognized constitutional rights, if at all, only for the most compelling reasons, even when its actors take the action in good faith.

Here, it was enough that the recruiting fortunes of the USL Ragin' Cajuns football program would be diminished by Respondent Kyle Kipps's decision to attend LSU to persuade the Fifth Circuit that his father should be compelled to sacrifice his employment as an assistant football coach at USL. "[Respondents'] motivation [for firing Kipps], according to the record in this case, was to mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts." *Kipps v. Caillier*, 197 F.3d at 769. (A-17.) That the decision of Kyle Kipps to attend LSU would scarcely have "materially and substantially interfered with the operation or effectiveness of the educational program" at USL is so obvious that the Fifth Circuit, had it applied the test announced in *Brantley/Fyfe*, would certainly have reversed and remanded the case with only the most cursory consideration of USL's stated rationale for its actions.

Neither *Brantley* nor *Fyfe*, to be sure, was decided on grounds of qualified immunity, a doctrine which has evolved considerably since those cases were decided. Still, the underlying conceptual underpinnings for immunizing state actors from liability in certain kinds of civil rights cases remains much the same. The Fifth Circuit now reasons that "[e]ven if [Respondents] violated Kipps's clearly established constitutional right, they are still entitled to qualified immunity if their actions were objectively reasonable." *Id.* at 769. (A-16.) The Fifth Circuit, on rehearing, reiterated the narrow scope of its decision. "Although we find that Kipps had a clearly established, constitutionally protected right to familiar association with his son, we continue to hold that the [Respondents'] actions were, under the unique facts of this case, objectively reasonable." *Kipps v. Caillier*, 205 F.3d 205, 206 (5th Cir. 2000). (A-30.) The scope of latitude allowed state actors to intrude on constitutionally protected rights, at least in the Fifth Circuit, is now substantially broader than one would have predicted from reading *Brantley* and *Fyfe*, not to mention the decisions of this Court on the subject. Otherwise, there

simply is no way to square the result reached in this case with the results in those cases.

Even in Mississippi in the 1980s where white parents were abandoning the recently desegregated public schools for private, all-white academies, it was not enough of a justification for school officials to attempt to deter that process by threatening school employees with termination if they contributed to it. In Louisiana at the turn of the new century, however, that a public institution of higher learning fears that the success of its football program may be compromised if it loses a prize recruit is enough to justify the institution's interfering with the familial rights of its employees, at least according to the Fifth Circuit.

The Fifth Circuit implies, 197 F.3d at 768 (A-16), that this striking broadening of the scope of what intrusions into constitutionally protected rights by state actors are permissible has been authorized by the decisions of this Court, most notably *Wilson v. Layne*, 529 U.S. 603, 119 S. Ct. 1692 (1999). The members of this Court would be justified in their astonishment at this conclusion. In fact, no such broadening of the scope of qualified immunity has been authorized by this Court. Rather, it has been created out of whole cloth by the Fifth Circuit.

In *Wilson v. Layne*, the Court explored whether police officers who conducted a media "ride-along" in the execution of an arrest warrant were entitled to qualified immunity from liability from a private suit for damages brought under 42 U.S.C. § 1983. The Court held that the practice of ride-alongs violated the Fourth Amendment, but, nonetheless, the Court concluded that the actions of the officers warranted the shield of qualified immunity. The Court applied the test of "objective reasonableness" very differently and more sensibly than it was applied by the Fifth Circuit here. The Court stated that "the appropriate question is the objective inquiry of whether a

reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 119 S. Ct. at 1700.

The lawfulness of media ride-alongs was by no means clearly established at the time, and, in fact, the circuits had split on their evaluation of the lawfulness of the practice. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 1701. To paraphrase the Court, the police may still qualify for immunity, even if they were wrong about the lawfulness of their conduct, if they reasonably could have believed that they were acting in the right. The Court was by no means suggesting that if the state actors knew or should have known that their conduct was unconstitutional they still might qualify for immunity if they were acting reasonably to achieve some greater good. Yet that is precisely the rationale for the Fifth Circuit's decision in this case, and, to its credit, the court was explicit about the rationale for its decision.

Indeed, this Court in *Layne* accepted that "[a]ccurate media coverage of police activities serves an important public purpose, and it is not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment." *Id.* at 1700. Yet the Court still held that the officers qualified for immunity not because the underlying conduct was intended to and perhaps did achieve some greater good but, rather, because the lawfulness of their conduct—e.g., permitting a media "ride-along" while conducting an arrest pursuant to a warrant—had not been determined conclusively to violate the Fourth Amendment. The matter was much in doubt that the officers were acting pursuant to an established written policy in permitting the ride-along. Their conduct, as determined by this Court, violated the Fourth Amendment, but they could have believed reasonably

that their actions did *not* contravene the protections afforded persons by that amendment to the Constitution:

> Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies.

Id. at 1701. That the officers were acting pursuant to a written policy was a persuasive fact to the Court. Here, USL's athletic department could hardly have relied, and did not in fact rely, on any policy, written or otherwise, to justify terminating Petitioner's employment.

In this case, the Fifth Circuit held that Respondents violated Petitioner's "clearly established, constitutionally protected right to familial association with his son." *Kipps v. Caillier*, 205 F.3d at 206. (A-30.) How could it conclude otherwise in light of this Court's decisions, not to mention the Fifth Circuit's own decisions in *Fyfe v. Curlee* and *Brantley v. Surles*? Indeed, even more recently, the Fifth Circuit concluded that it has been well recognized since at least 1992-1993 "that the constitution protects the right to family integrity." *Morris v. Dearborne*, 181 F.3d 657, 666 (5th Cir. 1999). The Fifth Circuit's peculiar reading of this Court's qualified immunity cases in the case at bar is no aberration in its jurisprudence. The Fifth Circuit apparently does not understand how the qualified immunity doctrine should be applied.

In *Dearborne*, a child was removed from her home and placed in foster care based upon a false report by a teacher that the child had been abused by her parents. The court concluded that "[e]ven if Dearborne's conduct violated a clearly

established constitutional right, she is entitled to qualified immunity if the conduct was objectively reasonable." *Id.* at 672. The court seems to be suggesting that when a public official violates a constitutional right of another person no liability can attach if the actor used objectively reasonable means to achieve an objectively reasonable purpose. The court compounds the confusion by noting that "[c]onduct that violates the United States Constitution and the state's criminal law is not objectively reasonable." *Id.* In other words, conduct which impinges a constitutionally protected interest is not reasonable if the actor uses unconstitutional means to accomplish the purpose, even if that purpose is objectively reasonable (as in *Dearborne,* to respond to a report of child abuse).

The morass created by the Fifth Circuit in its qualified immunity cases is further exemplified by *Eugene v. Alief Independent School District*, 65 F.3d 1299 (5th Cir. 1995), *cert. denied*, 517 U.S. 1191 (1996). There, a mother filed a § 1983 civil rights action against a school district and certain of its agents, alleging that she was wrongfully arrested and prosecuted in violation of her state and federal constitutional rights. The agents interposed as a defense to liability the doctrine of qualified immunity. The court observed that "qualified immunity does not shield a public official whose conduct violates clearly-established constitutional rights, if a reasonable person would have known that such conduct was unconstitutional." 65 F.3d at 1305.

To determine whether the public official was a reasonable person in this regard, the court applied its by-now familiar three-part test. First, the plaintiff must show that she asserted a violation of a constitutional right. In that case, the right was her right under the Fourth and Fourteenth Amendments to be free from malicious prosecution, false arrest, and bodily harm. Second, she must demonstrate that the right was "clearly established." Clearly, the rights in question

qualified as being clearly established. Finally, the actions of the public officials must have been objectively reasonable. This is how the court applied that test:

> Arresting and prosecuting Eugene [the plaintiff] would be objectively unreasonable if Conley and Griffin [the public officials] did not have probable cause for the arrest and prosection. To have probable cause, Conley and Griffin would have to possess knowledge that would warrant a prudent person's belief that Eugene had already committed or was committing a crime.

Id.

If Conley and Griffin had made the arrest and caused the prosecution with probable cause, then where is the constitutional violation? For their conduct to have been objectively reasonable, thus entitling them to interpose as a defense qualified immunity, the public officials were required by the Fifth Circuit to demonstrate that they had committed no constitutional violation in the first instance. If that is the test, then what is the purpose of the qualified immunity doctrine? If it is to have any meaning or purpose at all, the qualified immunity doctrine can only apply in situations where, although the public official violated or impinged on a recognized constitutional right, he did so reasonably, although mistakenly, believing at the time that he was violating no such right. Thus, in *Wilson v. Layne*, although the officers believed reasonably, in light of the inconclusive precedents, that they were not violating the Fourth Amendment in permitting a media ride-along, in fact they were violating the Fourth Amendment.[2]

---

[2]"We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant

Qualified immunity attached not because they thought they were justified in violating the homeowner's constitutional rights in achieving some higher purpose, but because they thought reasonably, if mistakenly, that they were *not* violating his rights.

Qualified immunity should be applied only in those few situations where, although the constitutional right to be protected is clearly established, it is not clearly established that the conduct at issue would violate that right and thus that the public official could reasonably have believed that he was not violating that right. Here, the Fifth Circuit accepted, based on this Court's and its own decisions,[3] that Petitioner Rexford Kipps's right to preserve his family relationships had been recognized as warranting constitutional protection for many years prior to 1998. The Fifth Circuit also accepted that this right was violated when his employment was terminated because his son chose to attend LSU. There can be little doubt that Respondents should have known that their conduct could not withstand constitutional scrutiny in light of *Fyfe v. Curlee* and *Brantley v. Surles*. The plaintiffs there stated a § 1983 claim when they alleged that their employment had been terminated because their children attended private schools. Should the outcome in this case have been any different if Kyle Kipps had chosen to attend Tulane University, a private institution in Louisiana, rather than LSU, a public institution?

---

when the presence of the third parties in the home was not in aid of the execution of the warrant." *Wilson v. Layne*, 119 S. Ct. at 1699.

[3]*See Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988), both quoted in *Morris v. Dearborne*, 181 F.3d at 667.

It is not enough for the public official to claim that he was acting to achieve some greater good when he infringed the civil rights plaintiff's clearly recognized constitutional right. It was immaterial for purposes of qualified immunity that the officers in *Layne* reasonably believed that ride-alongs served a useful public purpose. It was equally immaterial that they could have *proven* that ride-alongs served such a purpose. No officer today could claim qualified immunity for permitting a ride-along, no matter how compelling the public purpose served thereby, since this Court has now declared ride-alongs to be unconstitutional. All that was relevant in *Layne* was that the officials could reasonably have believed that they were not violating the homeowner's constitutional rights.

Similarly, in this case it was immaterial that Respondents believed they were justified in infringing the constitutional rights of Petitioner Kipps because, by doing so, the football recruiting at USL and its image among alumni and fans would be enhanced. The public objective sought to be achieved in *Layne* was far more compelling, yet in the end it made no difference to the outcome. The officers there were accorded qualified immunity because of their reasonable belief that what they did violated no constitutional right. Here, the Fifth Circuit *held* that Respondents had infringed on the constitutional rights of Rexford Kipps and his family, but the Respondents did so reasonably because of the purpose they sought to achieve. The conclusion simply does not follow.

This is a case where the Fifth Circuit has so far departed from the standards set forth by this Court in applying the doctrine of qualified immunity that the Court should address the merits of the case upon full review. The other circuits understand how the doctrine is to be applied. In *Gould v. Davis*, 165 F.3d 265 (4th Cir. 1998), for example, the court also applied a three-part test to determine whether qualified immunity should shield public officials from the consequences of their conduct. The court stated the test as follows:

> Qualified immunity protects government officials from suits for civil damages arising out of the exercise of their discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). This immunity is available when the conduct of the government employee "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* We have divided this standard into a three-part analysis. First, we must identify the right allegedly violated; second, we must decide whether the right was clearly established at the time of the alleged violation; and third, we must determine whether a reasonable person in the officer's position would have known that his or her actions violated that right. *Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir.1996).

Id. at 269.

The third prong of the test, on which the Fifth Circuit exclusively based its decision here, is properly stated and understood by the Fourth Circuit. The test requires an inquiry into whether the public official would have known that his conduct violated a protected right. If he knew that his conduct would violate that right, then he may not claim immunity from the consequences of his act under 42 U.S.C. § 1983. The concept of "reasonableness" in this context is much narrower than the Fifth Circuit apprehends it to be:

> In the final prong of the qualified immunity analysis, we must determine whether a reasonable person in the officers' position would have known that his actions violated the right alleged by the plaintiff. . . . The parties misconstrue this part of the analysis, however,

by arguing over whether the officers' behavior in this case was "reasonable." The question in qualified immunity is not whether the officers acted "reasonably" in the sense in which that term is used in tort law. The question is whether a reasonable person would have known about controlling law, once that law is deemed to have been clearly established under the second prong. The concept of objective reasonableness, as used in qualified immunity, is not a freestanding evaluation of the "reasonableness" of an officer's actions. Objective reasonableness provides that the qualified immunity analysis is an *objective* inquiry; it signals the Supreme Court's repudiation of a subjective qualified immunity standard, or "good faith" immunity, in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

The parties' confusion on this matter is understandable, given that some courts define the right alleged by a § 1983 plaintiff at a very general level under the second prong and consider the specific factual circumstances under the third prong. In such cases, the second prong of the qualified immunity analysis becomes a *pro forma* recitation of a general constitutional right, and the real "work" (that is, the consideration of the specific facts of the case) is done under the third prong. *See, e.g.*, *Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir.1996) (holding that the "right to be arrested only on probable cause" was clearly established and considering, under the third prong, "whether a reasonable person in [the officer's] position would have thought her actions

violated that right"). But where, as here, we have defined the right in the second prong in a well-defined, fact-specific manner, the third prong will be quite easy to resolve, absent extraordinary circumstances:

> When the inquiry proceeds to [the third prong], "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct," *Harlow*, 457 U.S. at 818-19, 102 S.Ct. 2727; however, the defendant may still be able to show "extraordinary circumstances" and "prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819, 102 S.Ct. 2727.

DiMeglio, 45 F.3d at 795 n. 1 (citations omitted).

Id. at 272-73.

Thus, the Fourth Circuit rightly concluded that "[t]he officers have offered no argument why, if their actions were in violation of clearly established law, a reasonable person would not have been aware of that law." *Id.* Here, too, a public school official, at least in the Fifth Circuit and probably in all circuits, should have been in no doubt that terminating the employment of a state employee because his child chooses to attend a particular educational institution contravened the constitutional right of that employee to be free from governmental interference in his familial relationships and thus

would subject the public official to civil liability, made actionable under the provisions of 42 U.S.C. § 1983. In fact, the Fifth Circuit held that the Respondents intruded into a constitutionally protected right of Petitioner Rexford Kipps, but the court nonetheless afforded Respondents qualified immunity because their actions were intended to accomplish some higher purpose—to enhance the athletic recruiting and reputation of USL.

The Fifth Circuit and the district court, in reaching this patently absurd conclusion, cited the slenderest of evidence. The only evidence proffered on summary judgment by the movants was the testimony of Spike Dykes, head football coach at Texas Tech University. *Kipps v. Caillier*, 197 F.3d at 769 n.6. (A-17.) There, the court made the utterly baffling statement: "Because we affirm the district court's dismissal of plaintiffs' claims based on qualified immunity, we do not speak to its ruling on justification." *Id.* (A-17.) Without the element of justification, the entire rationale for the Fifth Circuit's decision evaporates. If the Respondents' actions were not justified, then how could those actions have been reasonable, as the court apparently understands the concept of reasonableness in this context?

The Fifth Circuit's analysis and application of the doctrine of qualified immunity is wholly inconsistent with its own law, it is inconsistent with the law as applied in other circuits, and it so far departs from the law as handed down by this Court that it cannot be allowed to stand unchallenged. The Court is respectfully invited to grant the writ of certiorari and direct the parties to brief fully the issues on the merits.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit in this case and that, after full briefing and argument,

this Court reverse the judgment of the Court of Appeals and remand the case to the District Court for trial.

Respectfully submitted,

J. MINOS SIMON
J. MINOS SIMON, LTD.
1408 West Pinhook Road
Post Office Box 52116
Lafayette, LA 70505
(337) 233-4625

COUNSEL OF RECORD
FOR PETITIONERS

APPENDIX TABLE OF CONTENTS

Page

Opinion of the United States District Court for the Western District of Louisiana issued August 19, 1998 ..... A-1

Judgment of the United States District Court for the Western District of Louisiana entered August 18, 1998 ..... A-6

Opinion of the United States Court of Appeals for the Fifth Circuit issued December 6, 1999 ..... A-8

Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing/ Petition for Rehearing En Banc issued February 25, 2000 ..... A-24

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWELL, CLERK
DATE 08. 18. 98
BY s/ SJD

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

REXFORD KIPPS, CAROL KIPPS, and KYLE KIPPS

CIVIL ACTION NO. 97-1442

-vs-

SECTION "L-O" (JUDGE LITTLE)

JAMES CAILLIER, et al.

RULING

Before this court is the remaining issue in a motion for summary judgment filed by defendants Ray Authement, Nelson J. Schexnayder, Jr., and Nelson Stokley. For the reasons set forth below, defendants' motion on the issue of qualified immunity is granted. Plaintiffs' claims against defendants Authement, Schexnayder, and Stokley are dismissed with prejudice.

I.

On 17 March 1998, defendants Ray Authement, Nelson J. Schexnayder, Jr., and Nelson Stokley filed a motion for summary judgment. On 18 August 1998, this court denied in part defendants' motion; we, however, refrained from considering the issue of qualified immunity. We now will

consider whether the above defendants are entitled to the defense of qualified immunity.

II.

Defendants contend they are entitled to qualified immunity. Under the doctrine of qualified immunity, government officials exercising discretionary authority are shielded from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) (citations omitted). "A public official is protected by qualified immunity if a reasonable officer would have believed that his actions met constitutional standards." Matherne v. Wison, 851 F.2d 752, 756 (5th Cir. 1988) (footnote omitted) (citing Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)). "[T]he question is not whether the law was settled, viewed abstractly, but whether, measured by an objective standard, a reasonable officer would know that his action is illegal[] . . . .]" Id.

The burden is on the party seeking the damages to overcome the defense of qualified immunity. United States v. Burzynski Cancer Research Inst., 819 F.2d 1301, 1310 (5th Cir. 1987). "Where, as here, [] section 1983 defendant[s] plead[] qualified immunity and show [they are] governmental official[s] whose position[s] involve[] the exercise of discretion, the plaintiff[s] then ha[ve] the burden to 'rebut this defense by establishing that the officials[s'] allegedly wrongful conduct violated clearly established law.'" Pierce v. Smith, 117 F.3d 866, 871-72 (5th Cir. 1997) (quoting Salas v. Carpenter, 980 F.2d 299, 306 (5th Cir. 1992).

A three-step analysis is required to determine qualified immunity. Eugene v. Alief Indep. School Dist., 65 F.3d 1299, 1305 (5th Cir. 1995), cert. denied, ___ U.S. ___, 116 S. Ct.

1680, 134 L. Ed. 2d 782 (1996). First, the court must determine whether the plaintiff has stated a violation of a constitutional right. Id. Second, the court must determine if the plaintiff has proven that this right was clearly established at the time of the official's action. Once the plaintiff crosses this threshold, the court must consider plaintiff's examination of the objective reasonableness of the defendant official's conduct. Id. The plaintiff must show that the official knew or reasonably should have known that his actions, performed within the sphere of his official responsibility, would violate the plaintiff's constitutional rights. Harlow, 457 U.S. at 816, 102 S. Ct. at 2737. "The first step will generally involve analysis at a higher level of generality than the second [and third steps], which focus[] not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or of the factual setting in which it took place." Pierce, 117 F.3d at 872.

Qualified immunity is generally a question of law, not fact and should be resolved early on in the litigation. Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589 (1991). We already held in our 18 August 1998 ruling that the plaintiff, Rexford Kipps, established a property right violation. We must now measure from an objective standard whether the law was clearly established that the defendants could not terminate plaintiff Rexford Kipps in violation of his constitutional rights. Because the burden of proof rests with the plaintiffs, we focus on their analysis.

Plaintiffs contend that because qualified immunity is an objective standard, the defendants' reliance on their own opinions and personal experiences is insufficient to support summary judgment. In their motion and response, defendants rely on Rexford Kipps' status as an at will employee for support that the plaintiff could be terminated for the given reasons without violating his constitutional rights. As proof that their decision was objectively reasonable, defendants further rely on

the Board of Regents' policy and their awareness of assistant coaches who were fired or left at will. In response to defendants' contentions, plaintiffs neither set forth a violation of a clearly established constitutional right nor demonstrate that the defendants' conduct was anything but objectively reasonable. Defendants are not obliged to demonstrate that they did not violate a clearly established federal right; precedent places this burden on the plaintiffs. Before this court will subject these defendants to trial, plaintiffs must set forth facts underlying their claim, not mere conclusions. Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995).

The court has considered defendants' motion, responses, and supporting documents, and disregards, as irrelevant, the subjective motivation and belief as to the lawfulness of defendants' conduct. The court, however, stresses to the plaintiffs that "even [if] an officer [] subjectively intends to act unreasonably [,he] is [still] entitled to immunity if his actions are objectively reasonable." Pfannstiel v. City of Marion, 918 F.2d 1178, 1187 (5th Cir. 1990). We do, therefore, find the facts established purport to show that the defendants' motivation was reasonable. Plaintiffs, moreover, have failed to show that defendants knew or should have reasonably known that their actions would violate the constitutional rights of the plaintiffs. As such, this court grants defendants Authement, Schexnayder, and Stokley qualified immunity. Plaintiffs' claims against these three defendants, therefore, are dismissed with prejudice.

CONCLUSION

For the reasons set forth above, the portion of defendants' motion for summary judgment pertaining to the defense of qualified immunity is granted. Plaintiffs' claims

against defendants Authement, Schexnayder, and Stokley, therefore, are dismissed with prejudice.

Alexandria, Louisiana

18 August 1998

s/ F A Little Jr

F.A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE: 08/19/98
BY: s/ sjd
TO: s/ Decuir
s/ Simon
s/ Lee
s/ Picard

FILED
USDC. WESTERN DISTRICT OF LA
ROBERT H. SHEMWELL, CLERK
DATE 08. 18. 98
BY s/ SJD

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

REXFORD D. KIPPS, CAROL KIPPS and KYLE KIPPS

CIVIL ACTION NO. 97-1442

-vs-

SECTION "L-O" (JUDGE LITTLE)

JAMES CAILLIER, et al.

JUDGMENT

For the reasons given this date, the remaining issue in defendants' motion for summary judgment is granted.

Defendants Authement, Schexnayder, and Stokley are entitled to qualified immunity. Plaintiffs' claims against these three defendants are, therefore, dismissed with prejudice.

Alexandria, Louisiana

18 August 1998

s/ F A Little Jr.

F.A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

JUDGEMENT ENTERED 08/19/98
BY: s/ sid
COPY TO: s/ Decuir
s/ Simon
s/ Lee
s/ Picard

Rexford KIPPS, Carol Kipps and Kyle Kipps,
Plaintiffs-Appellants,
v.
James CAILLIER, Ray Authement, Nelson J. Schexnayder, Jr., and Nelson Stokley,
Defendants-Appellees.

No. 98-30978.

United States Court of Appeals,
Fifth Circuit

Dec. 6, 1999.

Former assistant football coach at university brought suit against head football coach, director of athletics, university president, and president of board of trustees. Plaintiff asserted constitutional and state law claims arising from his termination. The United States District Court for the Western District of Louisiana, F.A. Little, Jr., J., granted summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) defendants were entitled to qualified immunity from plaintiff's constitutional claims; (2) district court abused its discretion in imposing sanctions on plaintiff's counsel; and (3) plaintiff's wife and son could not recover emotional distress damages under Louisiana "bystander recovery" statute.

Affirmed in part and vacated in part.

DeMoss, Circuit Judge, filed specially concurring opinion.

Public officials acting within the scope of their official duties are shielded from civil liability by the qualified immunity doctrine.

Government officials are entitled to qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In order to establish that officials are not entitled to qualified immunity, plaintiffs must satisfy a three-part test: first, court must determine whether the plaintiff has alleged the deprivation of a constitutional right at all; second, the court must determine whether that right was clearly established at the time of the alleged violation; and finally, the court must determine whether the record shows that the violation occurred.

If it is determined that an official's conduct was unconstitutional, then the court determining qualified immunity issue must decide whether the conduct was nonetheless objectively reasonable.

With regard to qualified immunity issue, objective reasonableness of official's unlawful official action is a matter of law for the courts to decide, not a matter for the jury.

University officials were entitled to qualified immunity from § 1983 claim asserted by assistant football coach who was fired because his son chose to play football at another university within the state; even if officials violated coach's clearly established constitutional right, their action taken to mitigate the damage done to alumni relations and recruiting efforts was objectively reasonable. 42 U.S.C.A. § 1983.

The imposition of sanctions by a district court is reviewed for abuse of discretion.

A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Although a district court has inherent power to issue sanctions against attorneys for bad faith conduct in litigation, the threshold for the imposition of such sanctions is high, and the court must make a specific finding that the attorney acted in bad faith.

Although a district court has inherent power to issue sanctions against attorneys for bad faith conduct in litigation, the threshold for the imposition of such sanctions is high, and the court must make a specific finding that the attorney acted in bad faith.

District court abused its discretion in imposing sanctions on plaintiff's counsel, where not only did the district court fail to make a specific finding as to the bad faith of counsel's actions, but its sanctioning order was issued in the face of a magistrate's finding that counsel's actions were not "a bad faith attempt to disrupt or delay these proceedings."

Wife and son of football coach who was fired when son chose to play at another university could not recover emotional distress damages under Louisiana "bystander recovery" statute, where neither wife nor son actually viewed or were at the scene of the termination, but were merely notified or informed of the event after it occurred. LSA-C.C. art. 2315.6 J. Minos Simon (argued), Bradley Duane Watts, Office of J. Minos Simon, Lafayette, LA, for Plaintiffs-Appellants.

Winston G. DeCuir (argued), Linda L. Clark, DeCuir & Clark, Baton Rouge, LA for Caillier.

Mark E. Stipe (argued), David Alexander Young, Picard & Stipe, Lafayette, LA for Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before WIENER, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Plaintiffs appeal the district court's orders denying their motion in limine, dismissing the case for failure to state a claim and granting defendants' motion for summary judgment. We VACATE in part and AFFIRM in part.

FACTUAL HISTORY AND PROCEEDINGS BELOW

Rexford Kipps ("Kipps") was an assistant football coach at the University of Southwestern Louisiana ("USL") for approximately eleven years. Kipps's son, Kyle Kipps ("Kyle"), was a talented football player in southern Louisiana. Kyle was actively recruited by several universities in 1996 and 1997.

In March of 1996, Nelson Stokley ("Stokley"), USL's head football coach told Kipps that if Kyle did not attend USL, then he was to attend a college or university outside of Louisiana. Stokley warned Kipps that under no circumstances was Kyle to attend a Louisiana university other than USL.

On February 2, 1997, Kyle notified Stokley that he had orally committed to attend Louisiana State University ("LSU") on a football scholarship and that this commitment would soon be reduced to writing. The next day, Stokley advised Kipps that he was to forbid Kyle to memorialize the oral commitment to play football for LSU. Kipps responded that he would not (indeed, could not) command his son to refuse to reduce the verbal commitment to writing.

Based on Kyle's decision to attend LSU, Stokley terminated Kipps's employment with USL. In a February 20, 1997, letter, Nelson Schexnayder, Jr. ("Schexnayder"), USL

Director of Athletics, advised Kipps, based on Stokley's recommendation, that Kipps's employment with USL would be terminated effective June 30, 1997. Ray Authement ("Authement"), President of USL, was provided with a copy of this letter subsequently approved Kipps's termination. Additionally, James Caillier ("Caillier"), President of the Board of Trustees for Louisiana State Colleges and Universities approved Kipps's termination.

On July 22, 1997, plaintiffs instituted an action against Stokley, Schexnayder, Authement and Caillier, in their individual capacities, asserting, inter alia, constitutional claims and Louisiana state law claims. On August 28, 1997, defendants Stokley, Schexnayder and Authement filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). This motion was amended shortly thereafter to add Caillier.

On October 31, 1997, the district court denied defendants' motion to dismiss the claims asserted under 42 U.S. 1983 (1994) and granted defendants' motion as to the pendent state law claims under La. Civ. Code Ann. art. 2315.6 (West 1999) and La.Rev.Stat. Ann. § 23:631 (West 1999).

Stokley, Schexnayder and Authement next filed a motion for summary judgment pursuant to Fed..R.Civ.P. 56, asserting, inter alia, that the at-will employment status of Kipps precluded any wrongful termination action; that the defendants were entitled to qualified immunity; and that Kipps's termination was justified due to the effect that Kyle's choice of colleges would have on USL's ability to recruit athletes and on alumni relations. The next day, these defendants also filed a motion for sanctions against plaintiffs' counsel. On March 27, 1998, Caillier filed a summary judgment motion asserting, inter alia, that he did not participate in Kipps's termination and that Kipps's at-will employment status precluded a wrongful termination claim. Plaintiffs moved to oppose the summary judgment motions and the motion for sanctions. In addition,

plaintiffs filed motions in limine to exclude, inter alia, the following: (1) the qualified immunity defense and (2) justification defense.

The district court denied plaintiffs' motions in limine and granted Stokley, Schexnayder and Authement's motion for summary judgment on qualified immunity grounds. The district court granted appellee Caillier's motion for summary judgment on similar grounds and granted defendants' motion for sanctions against plaintiffs' counsel.

Plaintiffs invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1291 (1994) and the present the following issues for interlocutory appeal:

1. Did the district court commit reversible error in dismissing plaintiffs' claims based on the theory that "Qualified Immunity" exempted the defendants from liability?

2. Did the district court commit reversible error in refusing to grant plaintiffs' Motion to Exclude any Evidence as to the Defense of Justification?

3. Did the district court commit reversible error when it sanctioned plaintiffs' counsel?

4. Did the district court commit reversible error in dismissing plaintiffs' pendant state law claims under La. Civ.Code Ann. art. 2315.6 (West 1999)?

SECTION 1983 CLAIM

The district court granted defendants' summary judgment and dismissed plaintiffs' constitutional claims based

on the doctrine of "Qualified Immunity." We review a grant of a summary judgment de novo. See Steadman v. Texas Rangers, 179 F.3d 360, 366 (5th Cir.1999). Summary judgment shall be entered in favor of the moving party if the record, taken as a whole, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is "genuine" where a reasonable jury could return a verdict for the nonmoving party. See Crowe v. Henry, 115 F.3d 294, 296 (5th Cir.1997). If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Scales v. Slater, 181 F.3d 703, 708 (5th Cir.1999).

Qualified Immunity

Public officials acting within the scope of their official duties are shielded from civil liability by the qualified immunity doctrine. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Morris v. Dearborne, 181 F.3d 657, 665 (5th Cir.1999). Government officials are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.[1]

---

[1]With the announcement of this wholly objective standard, the Supreme Court rejected the subjective, good faith element of the qualified immunity defense adopted in Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Cf. Schultea v. Wood, 47 F.3d 1427, 1431 (5th Cir.1995) ("The Court's deletion of the subjective element of good faith rested on the pragmatic judgment that it 'frequently has proved incompatible with our admonition ... that

In order to establish that the defendants are not entitled to qualified immunity, plaintiffs must satisfy a three-part test. See, e.g., Morris, 181 F.3d at 665. First, "[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of a constitutional right at all." Wilson v. Layne, 526 U.S. 603, ___, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999); see also Morris, 181 F.3d at 665. Second, the court must "determine whether that right was clearly established at the time of the alleged violation." Wilson, 526 U.S. at ___, 119 S.Ct. at 1697. Finally, the court "must determine whether the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the defendant actually engaged in the conduct that violated the clearly-established right." Morris, 181 F.3d at 666 (quoting Kerr v. Lyford, 171 F.3d 330, 339 (5th Cir.1999)).[2] If it is determined that the official's conduct was unconstitutional, then the court must decide whether the conduct was nonetheless "objectively reasonable." See Eugene v. Alief Indep. School Dist., 65 F.3d 1299, 1305 (5th Cir.1995).

Assuming arguendo that defendants violated Kipps's clearly established constitutional liberty interest[3] in familial

---

insubstantial claims should not proceed to trial.'") (quoting Harlow, 457 U.S. at 815-16).

[2]This prong is not at issue since defendants do not challenge the core facts as asserted by plaintiffs.

[3]In addition to the issues we address in this opinion, plaintiffs claim that the district court committed an additional error when it converted plaintiffs' claimed liberty interest into a property interest. Because we assume the existence of such interest, it is not necessary for us to reach this question.

association[4] the resolution of this issue turns on whether the defendants' actions were "objectively reasonable." Because we find that defendants' actions were objectively reasonable, we affirm the district court's dismissal of Kipps's 1983 claim on the basis of qualified immunity.

Even if defendants violated Kipps's clearly established constitutional rights, they are still entitled to qualified immunity if their actions were objectively reasonable. "Objective reasonableness is a matter of law for the courts to decide, not a matter for the jury." Williams v. Bramer, 180 F.3d 699, 703 (5th Cir.1999); see also Wilson, 526 U.S. at ___, 119 S.Ct. at 1699 ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action.") (quoting Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

The record indicates that Kipps was fired because his son chose to play football for a Louisiana school other than USL. Notwithstanding the defendants' subjective motivation and belief as to the lawfulness of their conduct,[5] we find the

---

[4]Whether a constitutional liberty interest is implicated by the facts of this case is highly questionable.

[5]Defendants appear to argue on brief that because Kipps was an at-will employee, it was reasonable to fire him for any reason whatsoever. Kipps's status as an at-will employee is irrelevant to our analysis of this issue. It is well established in this Circuit that public authorities may not discharge an at-will employee for exercise of his constitutionally protected rights. Although public school authorities may discharge an employee unprotected by a reasonable expectation of continued employment for any job-related reason or for no reason at all,

defendants' motivation for terminating Kipps was objectively reasonable. See Pfannstiel v. City of Marion, 918 F.2d 1178, 1187 (5th Cir.1990) (holding that "even an officer who subjectively intends to act unreasonably is entitled to immunity if his actions are objectively reasonable") (citing Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Defendants' motivation, according to the record in this case, was to mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts.[6]

---

it is well established that they may not do so for a reason which infringes "constitutionally protected rights." Brantley, 718 F.2d at 1358 (quoting Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)). Defendants' counsel conceded this point at oral argument. Furthermore, the policy of the Board of Trustees allowing for the firing of an at-will employee, as interpreted by defendants, is also irrelevant to our analysis of this issue. "Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law." Wilson, 526 U.S. at ___, 119 S.Ct. at 1701. See also Babb, 33 F.3d at 478 n. 8 (holding that city policy regarding arrest procedure is irrelevant to qualified immunity analysis).

[6]Similar considerations are part of the balancing test inherent in defendants' alternative defense of justification. Because we affirm the district court's dismissal of plaintiffs' claims based on qualified immunity, we do not speak to its ruling on justification except to comment on a key element of the defense: the proffered expert opinion of Spike Dykes. Under this Circuit's pre-Kumho Tire interpretation of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the testimony of Mr. Dykes would have been inadmissible because it is speculative and not amenable to scientific verification. See Moore v. Ashland

The summary judgment record of this appeal contains no facts upon which we could find that defendants' actions were objectively unreasonable. The district court's ruling that all defendants are entitled to qualified immunity is AFFIRMED.

SANCTIONS AGAINST PLAINTIFFS' COUNSEL

Plaintiffs assert that the district court erred in sanctioning plaintiffs' counsel ("Simon") for a letter Simon sent to potential defendants in connection with this case. Although the magistrate judge concluded that Simon's behavior did not merit sanctions, she suggested that he write an amendatory letter "to explain ... any ambiguities regarding the intent and tone of his original letter." The district court granted the defendants' motion for sanctions and required Simon to send the amendatory letter. Simon sent the mandated letter, but nonetheless appeals the district court's decision. Because we hold that the district court abused its discretion, we VACATE its ruling on this issue.

The imposition of sanctions by a district court is reviewed for abuse of discretion. See Chaves v. M/V Medina Star, 47 F.3d 153, 156 (5th Cir.1995). "A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Id.

Chemical, Inc., 151 F.3d 269 (5th Cir.1998) (en banc). If anyone is an expert in recruiting football talent and alumni relations, Spike Dykes is such a person. The test of admissibility in Rule 702 is a flexible one that must be tailored to the facts of each case. See Kumho Tire v. Carmichael, 526 U.S. 137, ___, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238 (1999) ("Daubert makes clear that the factors it mentions do not constitute a 'definitive checklist or test'.") (quoting Daubert, 509 U.S. at 593 ("Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist.")).

(citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)).

Although a district court has inherent power to issue sanctions against attorneys for bad faith conduct in litigation, see Chambers v. NASCO, Inc., 501 U.S. 32, 43-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), the threshold for the imposition of such sanctions is high. See Chaves, 47 F.3d at 156. "In order to impose sanctions against an attorney under its inherent power, a court must make a specific finding that the attorney acted in 'bad faith.'" Id.

The district court abused its discretion in imposing sanctions on Simon. Not only did the district court fail to make a specific finding as to the bad faith of Simon's actions, but its sanctioning order was issued in the face of the magistrate's finding that Simon's actions were not "a bad faith attempt to disrupt or delay these proceedings." Because a specific finding as to the bad faith of Simon's actions was not made, and indeed, one could not be made form this record, we VACATE the district court's order imposing sanctions on Simon.

"BYSTANDER RECOVERY" CLAIM

Plaintiffs assert that the district court committed reversible error in dismissing their pendent state law claim under article 2315.6 of the Louisiana Civil Code for failure to state a claim upon which relief can be granted.[7] We disagree.

---

[7]Appellee Caillier asserts that we lack appellate jurisdiction over this claim because plaintiffs' appeal of this ruling was untimely. See Fed. R.App. P. 4(a)(1)(A). We disagree. Plaintiffs' notice of appeal was filed well within the required thirty days of the district court's August 18, 1998 order. That notice of appeal covers the district court's August 18, 1998 rulings, the district court's August 28, 1998 rulings

A Rule 12(b)(6) order of dismissal for failure to state a claim on which relief can be granted is reviewed de novo, and "will not be affirmed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 443 (5th Cir.1999) (quoting Blackurn v. City of Marshall, 42 F.3d 925, 931 (5th Cir.1995)).

Article 2315.6 of the Louisiana Civil Code is a "bystander recovery" statute that allows certain "persons who view an event causing injury to another person, or who come upon the scene of an event soon thereafter, [to] recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury." La. Civ.Code Ann. art. 2315.6 (West 1999). We are conscious of the fact that Louisiana's highest court is the appropriate place to seek the proper interpretation of this statute. See Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 492 (5th Cir.1999) ("If the state through its highest court has spoken clearly in interpreting its law, it is not within the authority of this Court to reinterpret that law.") (Parker, J., dissenting). The Louisiana Supreme Court recently "[spoke] clearly interpreting" this statute.

In Trahan v. McManus, 728 So.2d 1273 (La.1999), rev'g 689 So.2d 696 (La.Ct.App.1997), the parents of a 36-year-old patient, Terry Trahan, who died after he was negligently discharged from the hospital, brought suit for bystander damages against the doctor who discharged their son. Several hours after being brought home from the hospital, Terry complained of severe pain and his condition deteriorated. He

---

and "all subsidiary rulings occurring during the pendency of this action." Because the district court's October 31, 1997, 12(b)(6) ruling is not subject to Rule 54(b), it falls within the purview of "subsidiary rulings occurring during the pendency of this action." Therefore, our jurisdiction is proper.

died in the presence of his parents approximately seven hours after his discharge from the hospital.

The Louisiana Supreme Court held that, assuming the doctor's negligent omission was the "event" that caused Terry Trahan's injury, it "was not an injury causing-event in which the claimant was contemporaneously aware that the event caused harm to the direct victim, as required for recovery of Article 2315.6 damages." Trahan, 728 So.2d at 1280. In reaching this decision, the Trahan Court adopted the reasoning set forth in Lejeune v. Rayne Branch Hosp., 556 So.2d 559 (La.1990), and made the following statement: "The requirements of Article 2315.6, when read together, suggest a need for temporal proximity between the tortious event, the victim's observable harm, and the plaintiff's mental distress arising from an awareness of the harm caused by the event." 728 So.2d at 1279.

The facts interpreted in plaintiffs' favor show that neither Carol nor Kyle actually viewed or "[came] upon the scene" of the event-causing injury (Kipps's termination), but were merely "notified" or "informed" of the event after it occurred.[8] They do not fit within the framework of Article 2135.6 or the case law interpreting it. Therefore, the district court's dismissal of the plaintiffs' "bystander recovery" claim is AFFIRMED.

---

[8]We do not comment on the second prong of Article 2315.6: whether the harm suffered by Kipps was traumatic enough "that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience." La. Civ.Code Ann. art. 2315.6(B) (West 1999). Cf. Irvin v. Foti, No. CIV.A 99-1526, 1999 WL 504916, at *5 (E.D.La. July 13, 1999) ("[W]itnessing the arrest of a child, while traumatic is simply not the kind of injury contemplated by Art. 2315.6.").

CONCLUSION

For the foregoing reasons, we VACATE in part and AFFIRM in part the decision of the district court.

DeMOSS, Circuit Judge, specially concurring:

I concur in the result reached by the majority opinion as to all issues.

I write separately to express my view that our decision affirming the district court's grant of qualified immunity should be based upon the ground that the Kippses failed to state a cause of action for the violation of a clearly established constitutional right, rather than upon the ground that Schexnayder's decision to fire Kipps merely because Kipps' son decided upon another university was objectively reasonable as a matter of law. Whenever the factual or legal parameters of the amorphous "constitutional liberty interest in familial association" that they majority opinion assumes into existence, I find no. support in the case law for the proposition that such a right was clearly established when Kipps was fired or even that such a right is clearly established today. In sum, I agree that the defendants are entitled to qualified immunity as a matter of law, but I would affirm on the much stronger ground that the Kippses failed to state a claim for violation of a clearly established constitutional right.

I write also to express my dismay that the majority has used this opportunity to "comment on a key element" of the defendants' alternative justification defense, notwithstanding the majority's disclaimer that such comments are unnecessary to this Court's disposition and "do not speak" to the district court's actual ruling on the justification defense. Given the majority's concession that it need not, and indeed does not, reach the issue, see Majority Opinion at 769 n. 6, I would avoid "commenting" on the law or the facts governing that defense by

deleting footnote 6 in the majority opinion. The majority has taken a contrary approach, choosing to interject its own and rather simplistic view of the complex issues raised by the need to harmonize the Supreme Court's dispositions in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Kumho Tire v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238 (1999). That such an approach is inappropriate is perhaps best illustrated by the majority's decision to elevate Coach Dykes (as a matter of law and presumably for all future cases) to the status of an expert based upon some perceived change in the law arising from Kumho. Kumho was not decided until after briefing was complete in this case, and there is no adversarial briefing on the import of Kumho. Moreover, the Court's determination that the defendants are entitled to qualified immunity makes any "comments" on the effect of Kumho immaterial to the Court's decision. In sum, footnote 6 is nothing but gratuitous dicta which has no place in and forms no part of our decision in this case.

Rexford KIPPS, Carol Kipps and Kyle Kipps,
Plaintiffs-Appellants,
v.
James CAILLIER, Ray Authement, Nelson J. Schexnayder, Jr., and Nelson Stokley,
Defendants-Appellees.

No. 98-30978.

United States Court of Appeals,
Fifth Circuit

Feb. 25, 2000.

Former assistant football coach at university brought suit against head football coach, director of athletics, university president, and president of board of trustees, to recover for their alleged violation of his constitutional and state law rights in connection with his termination. The United States District Court for the Western District of Louisiana, F.A. Little, Jr., J., granted summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Parker, Circuit Judge, 197 F.3d 765, affirmed. On petition for rehearing en banc, the Court of Appeals, Parker, Circuit Judge, held that: (1) former assistant football coach for university had clearly established, constitutionally protected right to familial association with his son; but (2) university officials were entitled to qualified immunity from former coach's civil rights claims, that he was fired in alleged retaliation for his son's decision to play football at another university within state.

Petition for rehearing denied.

DeMoss, Circuit Judge, concurred in result and filed opinion.

Constitution accords special protection to two different types of association, "intimate association" and "expressive association." U.S.C.A. Const.Amend. 1.

Right to intimate association, i.e., the freedom to choose to enter into and maintain certain intimate human relationships, is fundamental element of personal liberty, which is accorded special protection under the Constitution.

At the foundation of right to intimate association, such as is accorded special protection under the Constitution, are family relationships.

Parent-child relationship lies at the heart of constitutionally protected familial associations.

Former assistant football coach for university had clearly established, constitutionally protected right to familial association with his son, and allegations in his civil rights complaint against university officials, that he was discharged by these officials in retaliation for his son's decision to play football at another university within state, sufficiently alleged requisite impingement on that constitutionally protected right.

Former assistant football coach for university had clearly established, constitutionally protected right to familial association with his son, and allegations in his civil rights complaint against university officials, that he was discharged by these officials in retaliation for his son's decision to play football at another university within state, sufficiently alleged requisite impingement on that constitutionally protected right.

Former assistant football coach for university had clearly established, constitutionally protected right to familial association with his son, and allegations in his civil rights complaint against university officials, that he was discharged by these officials in retaliation for his son's decision to play

football at another university within state, sufficiently alleged requisite impingement on that constitutionally protected right.

University officials were entitled to qualified immunity from § 1983 claim asserted by assistant football coach, who was fired in alleged retaliation for his son's decision to play football at another university within state; even if officials violated coach's clearly established constitutional right, their actions, which were taken to mitigate damage done to alumni relations and recruiting efforts, were objectively reasonable. 42 U.S.C.A. § 1983.

J. Minos Simon (argued), Bradley Duane Watts, Office of J. Minos Simon, Lafayette, LA, for Plaintiffs-Appellants.

Winston G. DeCuir (argued) Linda L. Clark, DeCuir & Clark, Baton Rouge, LA, for Caillier.

Mark E. Stipe (argued), Skinner & Stipe, David Alexander Young, Picard & Stipe, Lafayette, LA, for Authement, Schexnayder and Stokley.

Appeal from the United States District Court for the Western District of Louisiana.

ORDER DENYING REHEARING EN BANC

Before WIENER, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Plaintiff's petition the Court for a en banc rehearing of our panel opinion at 197 F.3d 765 (5th Cir.1999). Because we find that plaintiffs raise no arguments that were not adequately considered in the panel opinion, their petition for rehearing en banc is denied.

An issue was raised with respect to the panel majority's qualified immunity analysis. Specifically, whether a court could assume arguendo the first prong of the analysis—the existence of a constitutionally protected right.[1] Fifth Circuit case law appears to require a court to first answer whether an existing constitutional right has been asserted by a party. See, e.g., Evans v. Ball, 168 F.3d 856, 860 (5th Cir.1999) ("We may not pretermit that first prong but must decide whether Evans has alleged any constitutional violation before we may move to the inquiries under the second prong.") (citing Quives v. Campbell, 934 F.2d 668, 670 (5th Cir.1991)). Without resolving the question of whether Supreme Court and Fifth Circuit precedent require rigid application of Evans to all qualified immunity situations, we have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired.

Existence of a Liberty Interest in Familial Association

According to Supreme Court precedent, the Constitution accords special protection to two different types of association, "intimate association" and "expressive association." See Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); see also Louisiana Debating and Literary Assoc. v. City of New Orleans, 42 F.3d 1483, 1493-94 (5th Cir.1995). In Roberts, the Court noted that the right to intimate association, the freedom to choose "to enter into and maintain certain intimate human relationships," is a "fundamental element of personal liberty." 468 U.S. at 617-18, 104 S.Ct. 3244. At the foundation of this right to intimate association are family relationships:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of

> thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Roberts, 468 U.S. at 619-20, 104 S.Ct. 3244 (emphasis added); see also McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir.1994) ("At a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family.") (emphasis added). Supreme Court precedent with respect to intimate association can be synthesized as a continuum with "family relationships" at one end, receiving the most protection, and arms length relationships, like a business acquaintance, at the other end, "remote from the concerns giving rise to this constitutional protection." Roberts, 468 U.S. at 620, 104 S.Ct. 3244.

Defendants assert that in order to have an actionable claim based on familial association there must be a permanent and involuntary separation between parent and child. In other words, before a party can bring a cognizable claim based on interference with familial association, that relationship at issue must be totally destroyed. Notwithstanding the questionable validity of this position, defendants' argument misunderstands the nature of plaintiffs' alleged constitutional injury. Kipps claims that he was fired because of his actual association with his son.[2] See (Compl at ¶ 16). This is separate and distinct from a claim of state interference with that association.

The importance of the family has been discussed in numerous cases. See, e.g., Lehr v. Robertson, 463 U.S. 248, 258, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) ("[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."); Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship. care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'") (quoting Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Frankfurter J., concurring)); see also Tyson v. New York City Hous. Auth., 369 F. Supp. 513, 520 (S.D.N.Y. 1974) (holding that public housing tenants had a cause of action under the right of association when they were threatened with eviction because of acts committed by their adult children who did not live with them.)

Although it is clear that "family relationships" are subject to constitutional protection,[3] the definitional boundaries that limit the types of associations that constitute "family relationships" are blurred. The case subjudice, however, does not deal with an association on the fringe of the definition for "family relationships." Indeed, the parent-child relationship lies at the heart of protected familial associations. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Morris v. Dearborne, 181 F.3d 657, 671 (5th Cir.1999) ("The constitutional right to family integrity was well established in 1992."). Our recognition of Kipps's constitutional right[4] to familial association with his son (i.e., his right to preserve the integrity of that family relationship) does not take us to the

limits that may be imposed on constitutionally protected family relationships.

Kipp's association with his son deserves at least the same protection as association with members of a union, see Boddie v. City of Columbus, 989 F.2d 745, 750 (5th Cir.1993). ("We conclude that Chief Gale should reasonably have known that firing Boddie for his association with union firemen violated clearly established law.) Plaintiffs' claim that Kipps was terminated because his son chose to play football for LSU alleges the impingement of a cognizable constitutionally protected interest.

Objective Reasonableness of Defendants

Although we find that Kipps had a clearly established, constitutionally protected right to familial association with his son, we continue to hold that the defendants' actions were, under the unique facts of this case, objectively reasonable.[5] See Kipps, 197 F.3d at 768-70. Therefore, defendants are entitled to qualified immunity for their actions.

Conclusion

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc, see Fed. R.App. P. 35; 5th Cir. R. 35, the Petition for Rehearing En Banc is DENIED.

WIENER and ROBERT M. PARKER, Circuit Judges, concur in the entirety of this order.

DeMOSS, Circuit Judge, concurs specially.

DeMOSS, Circuit Judge, concurring in the denial of rehearing only:

On December 6, 1999, when the majority filed its original opinion in this case, it acknowledged that:

> Whether a constitutional liberty interest is implicated by the facts of this case is highly questionable.

Kipps v. Caillier, 197 F.3d 765, 769 n. 4 (5th Cir.1999). Now, less than 90 days later and without citation to any relevant intervening decision, the majority jumps to the following conclusion:

> We have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired.

Majority Opinion, at 2260. This 180 turnabout permits the majority to at least superficially comply with our precedent requiring that it first address the first prong of the qualified immunity analysis, by finding that the Kippses' alleged a violation of a clearly established constitutional right, but then in the end, return to the actual holding of the original opinion that:

> The defendants are entitled to qualified immunity because their conduct was objectively reasonable.

There are several serious problems with the majority's analysis of the first prong of the qualified immunity inquiry in this case. First, the majority spills a lot of ink driving home the importance of the family. I wholeheartedly agree that family relationships are important. I even agree that the United States

Constitution affords parents certain protections from unreasonable state interference in decisions regarding the care, custody, training, and education of their children. I do not agree, however, that the Constitution may be invoked to remedy every stupid, irrational, or unreasonable decision taken by a state official, regardless of whether there is actually any tangible interference in the family/parental relationship. The majority apparently disagrees, stating that:

> Kipps was fired because of his actual association with his son. This is separate and distinct from a claim of state interference with that association.

I can find no logical or jurisprudential support for the existence of a constitutional right of association that is so easily divorced from state interference with that right.

The majority's stated objective in making this questionable distinction is nothing more than an attempt to avoid the defendants' argument that the level of state interference must be that the facts state a claim of constitutional magnitude. Majority Opinion at 2261. I find the majority's cursory rejection of this argument unpersuasive, and therefore register my disagreement with the majority's view that some tangible level of state interference is not required to state a constitutional claim for violation of the plaintiffs' associational rights.

Having established that there is a clearly established right to familial association that is separate and apart from the right to be free from state interference with familial relationships, the majority next remarks that the facts in this case actually fall in the heartland, rather than "on the fringe," of the jurisprudence addressing the constitutional right to familial integrity. The majority's conclusion in this regard is supported by nothing more than the assumption that the case involves a

parent/child relationship. Majority Opinion at 2261 - 2262. I could not disagree more. At all times relevant to the actions in controversy in this suit, Kyle Kipps was over the age of 18, and under Louisiana law, his parents could no longer tell him where he had to go to school. There is no dispute whatsoever about the fact that Kyle Kipps himself, rather than his parents, made the decision to go to school at LSU and play football there. There is no dispute that Kyle had full and ample opportunity to discuss with his parents the choices and alternatives he had about going to college and playing football. Furthermore, there is no allegation that any of the defendants' conduct caused any breach or separation of the love and affection existing between the Kippses and their adult son. There are, therefore, no facts tending to establish any actual interference with the Kippses' familial relationships. I conclude that the Kippses have not alleged a clearly established right which some conduct of the defendants violated.

To the extent the majority concludes otherwise, I believe it is conflating the issues of whether a constitutional right exists in the abstract, and whether that right is implicated on the facts alleged by the plaintiffs. I note with some irony that the majority claims that I am the one who is confused about that distinction. Majority Opinion at 2261 n. 2. To the contrary, I understand that distinction quite well; indeed, it serves as the very foundation of my disagreement with the majority.

The majority assumes that the mere existence in the abstract of some clearly established constitutional right, in this case the right to "actual" familial association, is sufficient to defeat a claim of qualified immunity. But that is not the law. We have consistently required more than that the plaintiffs be able to name or invoke some clearly established constitutional right. A defendants' properly invoked claim of qualified immunity cannot be defeated absent factual allegations which, if accepted as true, at least potentially state a claim for violation

of that right. See, e.g., Shipp v. McMahon, 199 F.3d 256, 262 (5th Cir.2000); Petta v. Rivera, 143 F.3d 895, 899 (5th Cir.1998); Cantu v. Rocha, 77 F.3d 795, 805-08 (5th Cir.1996). For that reason, the relevant issue is not whether there might, in an appropriate case, be some constitutionally impermissible measure of intrusion into the familial relationship. The question is whether the Kippses' factual allegations even potentially set forth a claim for an intrusion into the familial relationship. The question is whether the Kippses' factual allegations even potentially set forth a claim for an intrusion of constitutional magnitude in this case. For the reasons stated, I do not believe the mere existence of a parent/child relationship between the Kippses and their son is sufficient to state a cause of action for such an intrusion.* I would therefore base the decision in this case upon the Kippses' failure to state the violation of a constitutional claim, rather than on the potentially ridiculous premise that the head coach's decision to fire Kyle's father because Kyle decided to attend LSU was objectively reasonable.

ENDNOTES

1 See, e.g, Kipps v. Caillier, 197 F.3d 765, 768-69 (5th Cir.1999) ("Assuming arguendo that defendants violated Kipps's constitutional liberty interest in familial association, the resolution of this issue turns on whether the defendants' actions were 'objectively reasonable.'").

2 The special concurrence focuses on Kyle Kipps's age as if it makes a difference in the analysis of the issues in this case. If anything, the fact that Kipps could not legally force his son to attend USL, supports the inference that Kipps was fired merely for his association with Kyle.

3 Laurenzo v. Mississippi High Sch. Activities Ass'n, 662 F.2d 1117, 1119 (5th Cir.1981) ("The constitutional right generally protecting the family has been recognized for nearly three score years by the Supreme Court.").

4 The assertion in the special concurrence that "the Kippses have not alleged violation of a clearly established right" misses the point. Mrs. Kipps and Kyle are unable to bring a constitutional claim under these circumstances. Only Rexford Kipps can properly claim a violation of his right to familial association. This explains the use of a singular possessive modifier in the opinion: Kipps's.

5 Judge DeMoss clearly places no great emphasis on the role recruiting plays in an athletic program. Perhaps his position is influenced by his distinguished tenure at Rice Institute, an institution whose academic repute greatly overshadows its athletic record. We can only point him to the affidavit testimony of Spike Dykes.

*The majority also claims I have "missed the point" by failing to realize that only Rexford Kipps alleged a violation of his right to familial association. I beg to differ. There are three plaintiffs in this case and all of the allegations relating to the

plaintiffs' familial association rights are consistently framed in terms of all three plaintiffs or all three complainants. See, e.g., Complaint 15 ("the defendants' actions impermissibly infringe upon complainants' right to make intimate, personal decisions regarding their familial relationships"); Id. 16 (defendants "violated complainants' right to association as guaranteed by the First, Third, Fourth, and Fifth Amendments to the United States Constitution, and Rexford 'Rex' Kipps' right to due process under the Fourteenth Amendment to the United State Constitution"). That being the case, I am frankly baffled by the majority's comment that only Rexford Kipps is raising the claim.

(2)

No. 99-1862

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

In The

Supreme Court of the United States

REXFORD KIPPS, CAROL KIPPS AND KYLE KIPPS,

Petitioners,

versus

JAMES CAILLIER, RAY AUTHEMENT, NELSON J. SCHEXNAYDER, JR. and NELSON STOKELY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WINSTON G. DECUIR, SR.
Counsel of Record
LINDA LAW CLARK
DECUIR & CLARK, LLP
1961 Government Street
Lafayette, Louisiana 70806
Telephone: (225) 346-8716

Attorneys for James Caillier

MARK E. STIPE
DAVID A. YOUNG
1018 Harding Street, Suite 206
P.O. Box 52169
Lafayette, Louisiana 70503
Telephone: (337) 291-2640
Attorneys for Ray Authement, Nelson J. Schexnayder, and Nelson Stokely

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

QUESTION PRESENTED

WAS THE COURT OF APPEALS CORRECT IN APPLYING THE DOCTRINE OF QUALIFIED IMMUNITY TO DISMISS PETITIONERS' 42 U.S.C. § 1983 CLAIMS?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Relevant Proceedings Below 1

Relevant Factual Elements 4

PERCEIVED MISSTATEMENT OF FACT OR LAW IN THE PETITION WHICH BEARS ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WAS GRANTED 8

REASONS FOR DENYING THE PETITION 12

I. The Court of Appeals Correctly Applied The Doctrine Of Qualified Immunity As Announced By This Court And As Applied By The Courts Of The Other Circuits In Dismissing Petitioners' 42 U.S.C. § 1983 Claims 12

a. Qualified Immunity Standard 12

b. The Basis For Believing Rexford Kipps Could Be Terminated 13

c. United States District Court August 18, 1999 Ruling 15

d. Fifth Circuit Court of Appeals' Decisions Concerning Qualified Immunity 16

i. The December 9, 1999 Decision 16

ii. The Record Before the Fifth Circuit Court of Appeals 17

iii. The February 25, 2000 Decision 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 13

Babb v. Dorman, 33 F.3d 472 (5th Cir.1994) 12

Geter v. Fortenberry, 849 F.2d 1550 (5th Cir.1988) 13

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 12, 13

Jacquez v. Procunier, 801 F.2d 789 (5th Cir.1986) 12

Kipps v. Caillier, 197 F.3d 765 (5th Cir.1998) 3, 17, 20

Kipps v. Caillier, 205 F.3d 203 (5th Cir.2000) 19, 20

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) 16

Pfannstiel v. City of Marion, 918 F.2d 1178 (5th Cir.1990) 16

Wilson, et al. v. Layne, et al., 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) 20

STATUTE

42 U.S.C. § 1983 ..... 1, 2, 12

STATEMENT OF THE CASE

Relevant Proceedings Below

On July 22, 1997, Petitioners instituted an action in the United States District Court for the Western District of Louisiana, asserting that the Respondents, while acting under color of state law, violated Petitioners' constitutional rights of privacy and association in violation of 42 U.S.C. § 1983.

On November 10 and 12, 1997, Respondents Authement, Schexnayder and Stokely and Respondent Caillier pled the affirmative defense of qualified immunity, respectively. Subsequently, Respondents filed a Motions for Summary Judgment on March 17, 1998 and March 27, 1998, respectively, arguing in part that qualified immunity barred Petitioners from making their claims against Respondents under the specific set of factual circumstances as alleged in the Petitioners' Complaint. Respondents based their Motion for Summary Judgment upon several factors which included: (i) Rexford Kipps was an at-will employee pursuant to the articulated policy of the Board of Trustees for State Colleges and Universities; (ii) discovery established that the decision to attend a particular university was Kyle Kipps' to make and his to make alone; (iii) Rexford Kipps' direct supervisor was Nelson Stokely, not Dr. Ray Authement, Nelson J. Schexnayder, Jr. or James Caillier; (iv) Dr. James Caillier served as an employee of the Board of Trustees for State Colleges and Universities which, in turn, is the constitutionally created Management Board for all state colleges under its jurisdiction, one of which was the University of Southwestern Louisiana ("U.S.L."); (v) the Management Board consists

of members appointed by the Governors who serve for staggered terms and are charged with promulgating rules, policies and procedures for the member colleges and who are vested with the voting authority in such management duties; (vi) Dr. Caillier, as an employee of the Board, served as President of the system and Secretary to the Board, but neither served as a Board Member, nor held voting status in his employment position; (vii) Stokely, as head football coach at U.S.L., terminated Rexford Kipps on February 12, 1997, pursuant to the Board Rules, Policies and Procedures and forwarded notice of such action to Schexnayder as Athletic Director; (viii) Schexnayder presented the notice of the job action to the University President, Authement; (ix) Dr. Caillier presented to the Board an *in globo* University Budget Report which included employment of a new U.S.L. coach in August, 1997, which was in fact approved by the Board members *in globo*; (x) Discovery established that Dr. Caillier neither received advanced notice of the termination of Kipps nor consulted with any of the members of the Kipps family nor other Respondents regarding Kipps' employment prior to his termination; (xi) Kipps never appealed the termination to the Board of Trustees; (xii) Respondents had a reasonable, good faith belief that it was constitutionally permissible for an at-will assistant football coach to be terminated; (xiii) Rexford Kipps' continued employment as an assistant football coach would have impaired the operation and/or effectiveness of the U.S.L. football program; (xiv) the family cannot share the elements of 42 U.S.C. § 1983; (xv) Petitioners' Complaint did not establish a compensable familial

association-based claim; and (xvi) Petitioners' Complaint did not establish a compensable retaliatory claim.

Within the body of its Ruling on Respondents Authement, Schexnayder, and Stokely's Motion for Summary Judgment, the District Court ordered Respondents to produce certain tangible evidence in support of their claim of justification in terminating Rexford Kipps. Pursuant to this Ruling, Respondents submitted a Supplemental Memorandum which included the entire deposition testimony of Spike Dykes, former Head Coach for the Texas Tech University.

On August 18, 1998, and August 28, 1998, respectively, the District Court granted Respondents' Motions for Summary Judgment based upon qualified immunity and concluded that it found "the facts established purport to show that the defendants' motivation was reasonable. Plaintiffs, moreover, have failed to show that defendants knew or should have reasonably known that their actions would violate the constitutional rights of plaintiffs." The Court further noted in its August 28, 1998 Ruling, which granted Respondent Caillier's Motion for Summary Judgment, that the "argument is substantially similar to the reasoning of" the previous Ruling on August 18, 1998.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. This Appeal was denied and the Judgment of the District Court was affirmed. The Court of Appeals also concluded that Respondents were entitled to qualified immunity because their actions were objectively reasonable. *Kipps v. Caillier*, 197 F.3d 765 (5th Cir.1998). Petitioners filed a

Motion for Rehearing and Suggestion for Rehearing *En Banc*, which was denied by the Court on February 25, 2000. The Court of Appeals reaffirmed its conclusion that Respondents were entitled to claim qualified immunity. Petitioners then filed the instant Application for Writ of Certiorari.

Relevant Factual Elements

The Rules promulgated by the Board of Trustees for State Colleges and Universities require that an assistant football coach be an "at-will" employee. The University of Southwestern Louisiana was under the jurisdiction of the Board of Trustees for State Colleges and Universities.

Rexford Kipps was employed as an assistant football coach at the University of Southwestern Louisiana through June 30, 1997.

Carol Kipps was employed in a civil service position classified as Clerk III in the administration at the University of Southwestern Louisiana from 1986 to October 1997. It was not asserted by plaintiffs that Carol Kipps suffered any retaliation or other adverse job action until the time she voluntarily resigned from the University of Southwestern Louisiana in October of 1997.

Kyle Kipps was born on October 10, 1978, and reached an age of majority on October 10, 1996.

Nelson Stokely was the Head Football Coach at the University of Southwestern Louisiana at all times pertinent herein and held that position from 1986 until his resignation in November of 1998. Nelson J. Schexnayder, Jr. is the Director for Athletics for U.S.L. and has held that

job since 1994. Dr. Ray Authement is the President of U.S.L. and has held that position from 1974 to present. Dr. James Caillier served as President of the State Colleges and University System and Secretary to the Board of Trustees.

In 1979, Rexford Kipps was given the position of defensive line coach, an assistant coaching position, at the University of Richmond. He was employed as an "at-will" employee. In 1979, Rexford Kipps was terminated as an assistant football coach at the University of Richmond; his termination was not the result of any actions or inactions on his part. In 1980, Rexford Kipps took a job as a graduate assistant football coach at Clemson University. In 1983, he left that position to take the defensive line coach's position at the University of East Carolina. He was employed as an assistant coach and the position was "at-will." In 1985, after a poor season, the entire coaching staff, including Rexford Kipps, was terminated. Rexford Kipps' termination was not the result of any actions or inactions on his part. In 1986, Rexford Kipps took the defensive line coach's position at U.S.L., under Respondent Stokely, as an assistant coach.

Nelson Stokely was employed as an assistant football coach at Virginia Tech University in 1977 and was an "at-will" employee. Nelson Stokely was terminated as an assistant football coach at the Virginia Tech University and his termination was not the result of any actions or inactions on his part.

During his tenure as head football coach at U.S.L., Nelson Stokely had Jack White and Louis Cook, "at-will"

assistant football coaches, resign employment from U.S.L. to take other positions.

An individual employed as an assistant football coach for the U.S.L. football program is required to coach student athletes in the football program, to recruit students athletes to play for U.S.L., and to help develop positive relations with the university's alumni and other university supporters. An individual employed as an assistant football coach for U.S.L. acts as a salesman when recruiting student athletes to the football program.

Kyle Kipps enrolled at Louisiana State University ("L.S.U.") in August of 1997, and is currently enrolled at that university. Carol Kipps did not relate to Kyle Kipps any discussions she or her husband allegedly had with U.S.L. officials concerning Kyle Kipps' selection of a university to attend. Rexford Kipps did not relate to Kyle Kipps any discussions he or his wife allegedly had with U.S.L. officials concerning Kyle Kipps' selection of a university to attend.

The following alumni and other supporters of the university's football program advised Nelson Stokely that they did not believe Rexford Kipps could effectively execute his job duties as an assistant football coach at U.S.L. after February 5, 1997: Dr. Phil Cramer, M.D., Tony Mannina, Mel Credeur, Jim Cramer, and "Lefty" Lafferty.

It was Nelson Stokely's belief that the continued employment of Rexford Kipps as an assistant football coach would have impaired the effectiveness and/or operation of the U.S.L. Football Program in that Rexford Kipps could not have been an effective recruiter of student athletes, and he would not be able to effectively help

develop positive relations with alumni and other supporters of the Football Program.

An "at-will" assistant football coach at U.S.L. was directly supervised by the head football coach at U.S.L. The Director of Athletics for U.S.L. did not directly supervise an assistant football coach employed by U.S.L. Nelson J. Schexnayder, Jr., in his capacity as Athletic Director for U.S.L., did not supervise the employment activities of Rexford Kipps. The President of U.S.L. does not directly supervise an assistant football coach employed by U.S.L. Dr. Ray Authement, in his capacity as President of U.S.L., did not directly supervise the employment activities of Rexford Kipps. Dr. Caillier, as President of the System and Secretary to the Board, does not directly supervise an assistant football coach at U.S.L.

Nelson J. Schexnayder, Jr. received no advance notice that Rexford Kipps would be terminated as an assistant football coach with U.S.L. Dr. Ray Authement received no advance notice that Rexford Kipps would be terminated as an assistant football coach with U.S.L. Dr. James Caillier received no advance notice that Rexford Kipps would be terminated as an assistant football coach with U.S.L.

Nelson Stokely, as head football coach at U.S.L., had the authority to hire and fire assistant football coaches at his discretion.

The financial support from alumni and other supporters of the Athletic Department accounted for twenty-eight percent (28%) of the total Athletic Department budget revenue for the fiscal year beginning July 1, 1995, and ending June 30, 1996. The financial support from alumni

and other supporters of the Athletic Department accounted for thirty-three percent (33%) of the total Athletic Department budget revenue for the fiscal year beginning July 1, 1996, and ending June 30, 1997.

The decision concerning what universities to select for recruiting visits was a decision made by Kyle Kipps. The decision concerning what university to attend in the Fall of 1997 was a decision made by Kyle Kipps. An individual who reaches the age of majority may attend any university he desires. Kyle Kipps received advice concerning what university to attend from one (1) of his high school football coaches, Zebulan Simon.

PERCEIVED MISSTATEMENT OF FACT OR LAW IN THE PETITION WHICH BEARS ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WAS GRANTED

Petitioners made the following assertions within their Petition to which Respondents maintain their adamant denial:

> Respondent Stokely, Head Football Coach, University of Southwestern Louisiana and Rexford Kipps' immediate superior, aggressively interfered and intruded himself into Petitioners' private zone of familial interaction and discussions regarding Kyle's future career as a football player. Respondent Stokely strongly intimated to Rexford Kipps that under no circumstances should Kyle enroll as a football player and student at any university in Louisiana other than USL. Further, he threatened Rexford Kipps with termination of his employment as an assistant

> football coach at USL if Kyle were to enroll at any other Louisiana university. Thus, Respondent Stokely held hostage Kipps' coaching employment with USL as a means of coercing Kipps into compelling his son to play football at USL, thereby interfering with Petitioners' free exercise of their right to privacy and familial association.

(Petitioners' Petition for Writ, pg. 4). Continuing on this theme, Respondents deny the following:

> As the recruiting deadline became imminent, the intensity of Stokely's interference with the family's discussion of Kyle's education and his future life increased.

(Petitioners' Petition for Writ, pg. 5).

The aforementioned assertions, made by Petitioners in the "STATEMENT OF FACTS" Section of their Petition are incorrect. Petitioners have repeatedly raised these inaccurate accusations throughout this case. At no time did Respondent Stokely aggressively interfere and intrude himself into Petitioners' private zone of familial interaction and discussions regarding Kyle Kipps' future career as a football player. At no time did Respondent Stokely threaten Rexford Kipps with termination if Kyle Kipps were to attend any other university in Louisiana. Thus, Respondent Stokely never held Rexford Kipps' employment hostage in an attempt to coerce Rexford Kipps into compelling Kyle Kipps to play football at U.S.L.

A reading of the pertinent portions of the discovery depositions paints a very different picture from the one painted by Petitioners. Above and beyond the fact that

Rexford and Carol Kipps could not legally direct the educational choice of Kyle Kipps in this matter, the evidence established in the course of discovery illustrates that they did not direct the educational choice of their son.

The existence and substance of any conversations between Nelson Stokley and Rexford Kipps are the subject of a vigorous factual dispute. However, there is no factual dispute, genuine or otherwise, that Rexford Kipps did not relate any of these alleged discussions to Kyle Kipps. (Rexford Kipps depo. pgs. 86, 87). Carol Kipps also testified in her deposition that any discussions between U.S.L. employees and Rexford and Carol Kipps concerning Kyle Kipps' college choice were not related to Kyle Kipps. As Carol Kipps testified:

> Q. All right. Now, your husband told us that he never shared with Kyle any of those discussions?
>
> A. No, sir.
>
> Q. And I take it that you didn't share with Kyle any of those discussions?
>
> A. No, sir.

(Carol Kipps depo pg. 51).

This is further corroborated by Kyle Kipps' testimony that his parents did not relate to him any conversations concerning what college he should attend. (Kyle Kipps depo. pg. 33).

The testimony of Rexford, Carol, and Kyle Kipps all conclusively establish that any influence allegedly exerted by U.S.L. officials was not conveyed to Kyle Kipps.

For that reason, there was no interference in Kyle Kipps' decision-making process.

Secondly, all three of the Kipps testified that the choice of what school to attend was Kyle Kipps', and Kyle Kipps' alone. (Rexford Kipps depo. pg. 56; Carol Kipps depo. page 34, 39, 74; Kyle Kipps depo. pg. 47). There can be no interference in Kyle Kipps' decision as a result of Rexford Kipps' employment if it was Kyle Kipps' decision to make.

Petitioners' Petition does not contain any pattern of behavior by Dr. Caillier. Deposition testimony of all parties substantiates no one consulted with or notified Dr. Caillier in advance of Rexford Kipps' termination and he was in fact named by the Kipps' family because they believed he had voting authority in his position. (Stokely depo. pg. 173; Schexnayder depo. pgs. 30, 31; Authement's depo. pgs. 62, 62; Rexford Kipps depo. pgs. 115, 116, 117; Carol Kipps depo. pgs. 98, 100, 101; Kyle Kipps depo. pg. 72).

The financial aspect of this decision was not an issue since all the universities were offering a scholarship, which covers room and board, books and tuition. (Stokely depo., pg. 188).

Kyle Kipps was the age of majority at the time he made his selection as to which university he would attend. Legally, he possessed the capacity to make that decision. In addition, the deposition testimony established that factually, all three (3) members of the Kipps family have acknowledged that the decision to attend L.S.U. was Kyle Kipps' and Kyle Kipps' alone to make.

Lastly, the deposition testimony established that any alleged conversations between the Kipps family and U.S.L. officials were not conveyed to Kyle Kipps; as such, there was no interference in Kyle Kipps' decision-making process as it concerned what university to attend.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Correctly Applied The Doctrine of Qualified Immunity As Announced By This Court And As Applied By The Courts Of The Other Circuits In Dismissing Petitioners' 42 U.S.C. § 1983 Claims

Petitioners seek this Court's reversal of the Fifth Circuit Court of Appeals' application of the doctrine of qualified immunity in affirming the District Court's dismissal of Petitioners' claims against Respondents by means of the affirmative defense of qualified immunity. The Court of Appeals committed no reversible error in its affirmation of the District Court's granting of Respondents' Motion for Summary Judgment on the ground of qualified immunity.

a. Qualified Immunity Standard

"Qualified" or "good faith" immunity shields governmental officials performing discretionary functions from liability "unless their conduct violates 'clearly established statutory or constitutional rights which a reasonable person would have known'." *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir.1994); citing *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir.1986), quoting *Harlow v. Fitzgerald*, 457

U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). "The protection afforded by the defense is an 'immunity from suit, not simply immunity from liability'." *Id.*, citing *Geter v. Fortenberry*, 849 F.2d 1550, 1552 (5th Cir.1988).

For a constitutional right to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531 (1987).

b. The Basis For Believing Rexford Kipps Could Be Terminated

The experience of both Nelson Stokely and Rexford Kipps supports that an assistant coach could be hired and fired "at-will." Rexford Kipps was fired from the University of Richmond and East Carolina University. In both instances, the firing had absolutely nothing to do with his conduct. The testimony of Rexford Kipps was that he was fired in both instances as a result of the "actions or inactions" of the head coach for whom he was working.

Similarly, Coach Nelson Stokely had firsthand knowledge of the vagaries of the position of assistant coach. While employed as an assistant at Virginia Tech University in 1977, Nelson Stokely was an "at-will" employee who was terminated without notice when the head coach for whom he worked was terminated. As with Rexford Kipps, Nelson Stokely was not terminated due to anything he did, but rather as a result of the actions or inactions of the head coach. As is implicit from Petitioners' lack of allegations concerning the subject, Rexford Kipps is not a member of any suspect class.

It should be emphasized that there is a flip side to "at-will" employment that has worked for the benefit of numerous assistant football coaches. Nelson Stokely had a variety of assistant football coaches resign from their employment with U.S.L. throughout the pendency of his tenure.

Another fact that makes it "reasonable" for Coach Stokely to believe he could terminate Coach Kipps is that Kyle Kipps was eighteen (18) at the time he committed to play football at L.S.U. A student who is the age of majority may attend any university he so desires without his parents' consent.

Respondents reiterate Nelson Stokely, Nelson J. Schexnayder, Jr. and Dr. Ray Authement had a reasonable, good faith belief that it was constitutionally permissible for an "at-will" assistant football coach to be terminated without violating his constitutional right to freedom of association. Additionally, Rexford Kipps and Nelson Stokely were previously terminated from positions as assistant football coaches for no cause and with little warning.

Additionally, several highly respected and influential alumni and financial supporters of the U.S.L. football program approached Respondent Stokely and expressed concerns that they did not believe Rexford Kipps could effectively execute his job duties as an assistant football coach at U.S.L.

The point of the foregoing is that it is entirely reasonable for Respondents to believe that a head football coach in 1997 could, with constitutional immunity, fire one of his assistants.

c. United States District Court August 18, 1998 Ruling

Respondents would then turn the Court's attention to the August 18, 1998 Ruling handed down by U.S. District Court Judge Little. Judge Little specifically found:

> We do, therefore, find the facts established purport to show that defendants' motivation was reasonable. Plaintiffs, moreover, have failed to show that defendants knew or should have reasonably known that their actions would violate the constitutional rights of the plaintiffs. As such, this court grants defendant Authement, Schexnayder and Stokely qualified immunity. Plaintiffs' claims against these three defendants, therefore, are dismissed with prejudice.

The Court, in its following Ruling which granted Dr. Caillier's Motion for Summary Judgment, noted that the arguments on immunity were substantially the same and therefore did not need reiteration.

Respondents assert that based upon an application of the governing standard of review and law, nothing exists in the record, in Judge Little's Ruling, or in the two (2) Judgments of the Fifth Circuit, which merits a reversal of the Court of Appeals' application of the doctrine of qualified immunity in affirming the District Court's dismissal of Petitioners' claims against Respondents.

d. Fifth Circuit Court of Appeals' Decisions Concerning Qualified Immunity

i. The December 9, 1999 Decision

The Fifth Circuit Court of Appeals correctly found that Respondents acted with objective reasonableness when Rexford Kipps was terminated. Within the body of its December 9, 1999 Decision, the Fifth Circuit Court of Appeals specifically addressed the issue of qualified immunity as it related to the relevant facts of the instant matter. The Court pertinently ruled:

> The record indicates that Kipps was fired because his son chose to play football for a Louisiana school other than USL. Notwithstanding the defendants' subjective motivation and belief as to the lawfulness of their conduct, (footnote omitted) we find the defendants' motivation for terminating Kipps was objectively reasonable. See *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir.1990) (holding that "even an officer who subjectively intends to act unreasonably is entitled to immunity if his actions are objectively reasonable") (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Defendants' motivation, according to the record in this case, was to mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts. (footnote omitted)
>
> The summary judgment record of this appeal contains no facts upon which we could find that defendants' actions were objectively unreasonable. The district court's ruling that defendants are entitled to qualified immunity is AFFIRMED.

Kipps v. Caillier, 197 F.3d 765, 768-70 (5th Cir.1999). As such, it is clear that where a public official is performing a discretionary function, he or she is generally granted qualified immunity and shielded from liability insofar as his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The practical application of this means that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.

Respondent Stokely was a public official performing a discretionary function, that of firing an assistant football coach from his at-will position. It is undisputed that the authority to hire and fire assistant football coaches was vested in Respondent Stokely. As such, Respondent Stokely would generally be granted qualified immunity and would be shielded from liability insofar as his conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known. The resolution of this issue turns on whether the Respondents' actions were objectively reasonable, assessed in light of the legal rules that were clearly established at the time they were taken.

ii. The Record Before The Fifth Circuit Court of Appeals

The Fifth Circuit had before it the entire record in this matter, both pleadings and discovery, when it

rendered its decision; that fact cannot be understated. That record included the depositions of Rexford Kipps, Respondent Stokely, Respondent Schexnayder and Coach Spike Dykes. All of these individuals worked in and operated under the particular rules, both written and unwritten, of the world that is college football. Although the Fifth Circuit specifically opined that Rexford Kipps was fired "because his son chose to play football for a Louisiana school other than USL" and found Respondents' motivation was to "mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts", it cannot be understated that when rendering its decision, the Fifth Circuit reviewed and relied upon the insight taken from the above-mentioned individuals. These depositions provided the Fifth Circuit with illustrative information which buttressed Respondents' objectively reasonable belief that in 1997, a college head football coach could, with constitutional immunity, fire one of his assistant coaches.

Both Respondent Stokely and Petitioner Kipps had been personally involved in the seemingly indiscriminate methods of hiring and firing assistant football coaches (Stokely at Virginia Tech University and Rexford Kipps at both the University of Richmond and East Carolina University). It should also be emphasized that there is a flip side to "at-will" employment that has worked for the benefit of numerous assistant football coaches. Nelson Stokely had a variety of assistant football coaches resign from their employment with U.S.L. throughout the pendency of his tenure. Additionally, Respondent Stokely

was receiving pressure from sources outside the immediate program, in the form of alumni and financial supporters who expressed their concern over the fact that Rexford Kipps would be rendered ineffectual as an assistant coach charged with recruiting players and reinforcing alumni relations. The deposition testimony of Coach Spike Dykes, who Judge Parker laureled by opining, "If anyone is an expert in recruiting football talent and alumni relations, Spike Dykes is such a person," provided substantial, corroborative weight to the idea that Respondent Stokely could exercise objective reasonableness and fire Rexford Kipps with constitutional immunity. Finally, the fact that Kyle Kipps was eighteen (18) at the time he committed to play football at L.S.U., and a student who is the age of majority may attend any university he so desires without his parents' consent, makes it "reasonable" for Respondent Stokely to believe he could terminate Rexford Kipps without violating his constitutional rights of familial association.

As stated *supra*, the point of all of the foregoing is that it was entirely reasonable for Respondents to believe that a head football coach in 1997 could, with constitutional immunity, fire one of his assistant coaches.

iii. The February 25, 2000 Decision

The issue of qualified immunity was revisited by the Fifth Circuit Court of Appeals on rehearing. See *Kipps v. Caillier*, 205 F.3d 203 (5th Cir.2000). The Court, upon rehearing, reiterated its previous findings by opining:

> Although we find that Kipps had a clearly established, constitutionally protected right to

> familial association with his son, we continue to hold that the defendants' actions were, under the unique facts of this case, objectively reasonable. (footnote omitted) See *Kipps*, 197 F.3d at 768-700. Therefore, defendants are entitled to qualified immunity for their actions.

Kipps v. Caillier, 205 F.3d at 206. As such, the Fifth Circuit has ruled not once, but twice, that the actions of Respondents were, under the unique facts of this particular case, objectively reasonable. To now suggest that the Fifth Circuit Court of Appeals somehow misapplied the governing standard on qualified immunity, as outlined by this Court in *Wilson* and any number of other cases, is without merit. See *Wilson, et al. v. Layne, et al.*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

CONCLUSION

The issue raised by Petitioners does not merit consideration. The United States Court of Appeals for the Fifth Circuit properly applied the doctrine of qualified immunity, as announced by this Court and as applied by the Courts of the other Circuits, to the unique facts of this particular case on two (2) separate occasions. Consequently, Petitioners' Petition should be denied.

Respectfully submitted,

WINSTON G. DECUIR, SR.
Counsel of Record
LINDA LAW CLARK
DECUIR & CLARK
1961 Government Street
Baton Rouge, Louisiana 70806
Telephone: (225) 346-8716

Attorneys for James Caillier, Ray Authement, Nelson J. Schexnayder and Nelson Stokely

MARK E. STIPE
DAVID A. YOUNG
1018 Harding Street, Suite 206
P.O. Box 52169
Lafayette, Louisiana 70503
Telephone: (337) 291-2640
Attorneys for Ray Authement, Nelson J. Schexnayder, and Nelson Stokely